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**IN THE  
COURT OF APPEALS OF INDIANA**

MARK A. RODGERS,

Appellant-Defendant,

VS.

STATE OF INDIANA,

Appellee-Plaintiff.

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No. 79A05-0612-CR-731

APPEAL FROM THE TIPPECANOE CIRCUIT COURT

The Honorable Donald L. Daniel, Judge

Cause No. 79C01-0607-FC-44

**August 31, 2007**

**MEMORANDUM DECISION - NOT FOR PUBLICATION**

## SHARPNACK, Judge

Mark A. Rodgers appeals his sentence for battery causing serious bodily injury as a class C felony.<sup>1</sup> Rodgers raises two issues, which we revise and restate as:

- I. Whether the trial court abused its discretion in sentencing Rodgers; and
- II. Whether Rodgers's sentence is inappropriate in light of the nature of the offense and the character of the offender.

We affirm.<sup>2</sup>

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<sup>1</sup> Ind. Code § 35-42-2-1(a)(3) (Supp. 2005).

<sup>2</sup> A copy of the presentence investigation report on white paper is located in the appellant's appendix. We remind the parties that Ind. Appellate Rule 9(J) requires that "[d]ocuments and information excluded from public access pursuant to Ind. Administrative Rule 9(G)(1) shall be filed in accordance with Trial Rule 5(G)." Ind. Administrative Rule 9(G)(1)(b)(viii) states that "[a]ll pre-sentence reports pursuant to Ind. Code § 35-38-1-13" are "excluded from public access" and "confidential." The inclusion of the presentence investigation report printed on white paper in his appellant's appendix is inconsistent with Trial Rule 5(G), which states, in pertinent part:

Every document filed in a case shall separately identify information excluded from public access pursuant to Admin. R. 9(G)(1) as follows:

- (1) Whole documents that are excluded from public access pursuant to Administrative Rule 9(G)(1) shall be tendered on light green paper or have a light green coversheet attached to the document, marked "Not for Public Access" or "Confidential."
- (2) When only a portion of a document contains information excluded from public access pursuant to Administrative Rule 9(G)(1), said information shall be omitted [or redacted] from the filed document and set forth on a separate accompanying document on light green paper conspicuously marked "Not For Public Access" or "Confidential" and clearly designating [or identifying] the caption and number of the case and the document and location within the document to which the redacted material pertains.

The relevant facts follow. On July 4, 2006, Rodgers was with Christa Stichter, the mother of his child. He was “on some drugs” when he and Stichter got into a fight. Transcript at 8. Rodgers knowingly struck her in a rude and insolent manner, and she suffered broken bones, fractures, and “blow ups around the eyes.” Id. The injuries impaired at least one of her bodily functions and caused pain. Their child witnessed the fight.

On July 28, 2006, the State charged Rodgers with: (1) Count I, battery resulting in serious bodily injury as a class C felony; (2) Count II, domestic battery as a class D felony;<sup>3</sup> (3) Count III, possession of a schedule IV controlled substance as a class D felony;<sup>4</sup> and (4) Count IV, interference with the reporting of crime as a class A misdemeanor.<sup>5</sup> On September 26, 2006, Rodgers pleaded guilty to battery resulting in serious bodily injury as a class C felony, and the State dismissed the other charges. The plea agreement left the sentencing to the trial court’s discretion.

At the sentencing hearing, Stichter testified that Rodgers “shattered three of the four major bones in [her] face” and that she had had reconstructive surgery, which included a prosthetic eye socket and prosthetic cheekbone. Transcript at 19. The trial

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<sup>3</sup> Ind. Code § 35-42-2-1.3(b) (Supp. 2006).

<sup>4</sup> Ind. Code § 35-48-4-7 (2004).

<sup>5</sup> Ind. Code § 35-45-2-5 (2004).

court found the following mitigating factors: (1) Rodgers had shown remorse and had taken responsibility for his actions by entering a plea of guilty; (2) Rodgers has a dependent child; (3) Rodgers's LSI-R (Level of Service Inventory) score was low; and (4) Rodgers served in the armed forces. The trial court found Rodgers's criminal history, his history of drug and alcohol abuse, and the fact that Rodgers committed the offense in the presence of a child to be aggravating factors. Finding that the aggravators outweighed the mitigators, the trial court sentenced Rodgers to five years in the Indiana Department of Corrections, with two years suspended, one year in community corrections, and one year on probation.

#### I.

The first issue is whether the trial court abused its discretion in sentencing Rodgers. We note that Rodgers's offense was committed after the April 25, 2005, revisions of the sentencing scheme. In clarifying these revisions, the Indiana Supreme Court has held that "the trial court must enter a statement including reasonably detailed reasons or circumstances for imposing a particular sentence." Anglemyer v. State, 868 N.E.2d 482, 491 (Ind. 2007). The reasons given, and the omission of reasons arguably supported by the record, are reviewable on appeal for abuse of discretion. Id. The relative weight or value assignable to reasons properly found or those which should have been found is not subject to review for abuse of discretion. Id. Remand for resentencing may be the appropriate remedy if we cannot say with confidence that the trial court would have imposed the same sentence had it properly considered reasons that enjoy

support in the record. Id. Rodgers argues that the trial court abused its discretion by enhancing his sentence based on facts supporting charges that the State dismissed pursuant to his plea agreement. Specifically, he argues that the trial court improperly found the presence of his child at the battery to be an aggravating factor because this fact was an element of the domestic battery charge, which was dismissed.

A plea agreement is a contract binding upon both parties when accepted by the trial court. Farmer v. State, 772 N.E.2d 1025, 1027 (Ind. Ct. App. 2002). This court will give effect to the parties' intent. Id. A trial court's reliance on facts that support charges dismissed as part of a plea agreement essentially circumvents the plea agreement and is therefore improper. Id. Here, the State charged Rodgers with domestic battery as a class D felony for knowingly or intentionally touching "an individual . . . who . . . has a child in common with the other person . . . which offense was committed in the physical presence of . . . a child less than sixteen years of age . . . and knowing that said child was present and might be able to see or hear said offense." Appellant's Appendix at 30. The State dismissed this charge in accordance with Rodgers's plea agreement. Thus, the trial court abused its discretion in considering the presence of Rodgers's son as an aggravating factor. See Farmer, 772 N.E.2d at 1027 (holding the trial court improperly enhanced defendant's sentence by resort to facts supporting charges dismissed pursuant to a plea agreement).

Although the trial court improperly found one aggravator, we may only remand for resentencing if we cannot say with confidence that the trial court would have imposed

the same sentence had it properly considered the aggravating and mitigating factors. Anglemyer, 868 N.E.2d at 491. Battery resulting in serious bodily injury as a class C felony carries an advisory sentence of four years, to which the trial court added only one year. Furthermore, the trial court suspended two years for a total executed sentence of three years. Although the trial court improperly found one aggravator, it considered two others, Rodgers's "significant" criminal history and his history of illegal drug use. Transcript at 33. Rodgers does not challenge the validity of those aggravators. Given Rodgers's prior convictions and his history of substance abuse, we can say with confidence that the trial court would have imposed the same sentence had it properly considered the aggravating and mitigating factors.

## II.

The next issue is whether Rodgers's sentence is inappropriate in light of the nature of the offense and the character of the offender. Ind. Appellate Rule 7(B) provides that we "may revise a sentence authorized by statute if, after due consideration of the trial court's decision, [we find] that the sentence is inappropriate in light of the nature of the offense and the character of the offender." Under this rule, the burden is on the defendant to persuade the appellate court that his or her sentence is inappropriate. Childress v. State, 848 N.E.2d 1073, 1080 (Ind. 2006).

Our review of the nature of the offense reveals that Rodgers was "on some drugs" when he and the mother of his child got into a fight. Transcript at 8. Rodgers knowingly struck her in a rude and insolent manner, and she suffered broken bones, fractures, and

“blow ups around the eyes.” Id. The injuries impaired at least one of her bodily functions and caused pain.

Our review of the character of the offender reveals that Rodgers has prior convictions for operating while intoxicated, possession of marijuana, and driving while suspended. Rodgers also has a prior conviction for battery. Taken together, these convictions reveal a pattern of contempt for the law. Furthermore, although he has acknowledged that he has substance abuse problems that “have controlled the biggest part of [his] life,” he has not resolved this longstanding issue. Id. at 28.

After due consideration of the trial court’s decision, we cannot say that the sentence imposed by the trial court is inappropriate in light of the nature of the offense and the character of the offender. See, e.g., Martin v. State, 784 N.E.2d 997, 1013 (Ind. Ct. App. 2003) (holding that defendant’s maximum sentence for battery as a class C felony was not inappropriate), reh’g denied.

For the foregoing reasons, we affirm Rodgers’s sentence for battery causing serious bodily injury as a class C felony.

Affirmed.

MAY, J. and BAILEY, J. concur